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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 282.

HELEN C. JOHNSON, HERBERT F. JOHNSON, JR., HENRIETTA J. LOUIS, AND JOHN J. LOUIS, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF S. C. JOHNSON & SON, APPELLANTS,

VS.

ARTHUR STAR, APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS.

SUPPLEMENTAL BRIEF OF APPELLANTS CHALLENGING BRIEF OF APPELLEE AS MISQUOTING RECORD.

SPEARMAN WEBB,
Attorney for Appellants.

SUBJECT INDEX

Appellants challenge brief of appellee as misquoting the record—

That the following statement of facts in appellee's brief conflicts with the record, the statement being that no acceptance by the creditors was required 2

That the following statement of facts in appellee's brief conflicts with the record, the statement being that no discharge was sought by assignee or assignor and that no release of future liability was ever requested of appellants 3

That the following statement of facts in appellee's brief conflicts with the record, the statement being that $582.63, the funds in the assignee's hands, are to be applied on $11,000 of indebtedness, or less than four per centum to each creditor 4

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The following statement of facts set out in appellee's brief under his statement of the case on pages 2 and 3 thereof, are challenged as incorrect, not supported by

the record, and in direct conflict therewith. These statements by appellee, which are here challenged are:

1. That no acceptance by the creditors was required (Appellee's Brief, p. 1).
2. That no discharge was sought by assignee or assignor and that no release of future liability was ever requested of appellants (Appellee's Brief, p. 2).
3. That $582.63, the funds in the assignee's hands, are to be applied on $11,000 of indebtedness, or less than four per centum to each creditor (Appellee's Brief, p. 2).

1.

The statement that no acceptance by the creditors was required is in conflict with this record, as the assignment was purely statutory, and so admitted in the agreed statement of facts, which reads in part, as follows:

> "In compliance with the statutes and acting under the authority therein conferred, and pursuant thereto, said Arthur Star, garnishee herein, as such assignee took possession of all the assets and property of said corporation, etc." (R. p. 8).

That the assignment was under the provisions of the statute and controlled thereby, is shown in the record by the trial court's "Findings of Fact" (R. p. 10), from which the following is quoted:

> "• • • which deed of assignment is in compliance with Title 12, of the 1925 Revised Civil Statutes of Texas, etc."

And the assignment was so considered by the trial court in his conclusions of law (R. p. 11), in which the

issues of law were determined purely on the question of validity of Title 12 of the Texas statutes. The assignment was considered purely statutory by the Texas Court of Civil Appeals in its opinion (R. p. 13) in which that court declared in its opening words:

> "The question for decision is whether the 'Assignment for Creditors' Act, Title 12, R. S. 1925, was suspended by the National Bankruptcy Act, etc."

The Supreme Court of Texas considered the assignment purely statutory and so dealt with it in its opinion (R. p. 58).

Being purely statutory, by force of the statute itself, the acceptance of creditors was not only requested, but as a matter of law, required. Article 265 of the statute, printed in appellants' brief on page 6, provides in part as follows:

> "No creditor not assenting shall receive or take any benefit from the assignment."

2.

Equally conflicting and equally unsupported by the record is the statement that no discharge was sought by assignee or assignor, and that no release of future liability was ever requested of appellants. Appellee refers to no portion of the record in support of his statement of facts. As set out in paragraph 1 of this brief, this is a statutory assignment, and all the acts of the assignee were under the statutory authority, and regulations. This is admitted in every part of the

record from the beginning to the end, except in appellee's brief.

The assignment being statutory and controlled by the statutory regulations, the judgment debtor was seeking a discharge and such discharge was by force of the statute imposed upon accepting creditors, as Article 263 of the statute printed on page 6 of appellants' brief reads as follows:

> "DISCHARGE OF LIABILITY.—A debtor may make such assignment and shall thereupon stand discharged from all further liability to such consenting creditors on account of their respective claims. Such debtor shall not be discharged from liability to such creditor who does not receive as much as one-third of the amount due and allowed in his favor as a valid claim against the estate of such debtor."

This statutory discharge is not dependent upon a *request* by the judgment debtor, but is imposed arbitrarily by the statute, and enforced by the decisions in the State of Texas, as set out in appellants' original brief.

3.

The statement by appellee that the funds in the hands of the assignee are to be applied on $11,000 of indebtedness or less than 4 per centum to each creditor, is misleading, and not supported by the record.

It is quite true that in the trial court's "Findings of Fact" (R. p. 10) the court declared that:

> "The amount of unsecured indebtedness of the Dallas Showcase and Manufacturing Company

> at the time of such deed and assignment, was approximately $11,000.00,"

but this statement does not support appellee's declaration that the funds were to be distributed to the *unsecured creditors,* amounting to that sum.

No unsecured creditor is entitled to share in that distribution unless he has *assented* to the assignment.

Article 265 of the statute, printed in appellants' brief on page 6, in part declares:

> "No creditor not assenting shall receive or take any benefit under the assignment."

In order to determine the amount of the claims entitled to share in the distribution, it must be determined the number of *assenting* creditors, and the aggregate amount of *their* claims. There is not one line in this record showing that any creditors have accepted under the assignment, and as stated in our original brief, it is therefore not made to appear in the record whether the statutory discharge of the unpaid portion of the debts would be effective, and appellants *would necessarily have to consent* to the statutory provision discharging the unpaid portion *in the event* the necessary one-third was eventually paid.

Besides this, it is not shown by this record that appellants knew either of the amount of funds on hand by the assignee or the amount of the indebtedness of the judgment creditor at the time the suit was filed, on April 9, 1931 (R. p. 1). These facts developed, if they did develop at all, on June 4, 1931, sixty days after

the filing of this suit (R. p. 7). Appellants' position is to be judged, not by the *later developments,* in the litigation, but by the facts in their possession when they were called upon either to accept under the assignment or to decline to do so, and they should not be required to speculate as to what may possibly develop under the administration by the assignee.

The trial court's "Findings of Fact" (R. p. 10) have no proper place in this record, and do not bind anyone for the reason that this case was tried upon an agreed statement of facts (R. p. 7), in which appellee agreed in writing that:

> "Upon the foregoing facts, together with garnishee's original answer and a transcript of the justice court record, this case is submitted to this court for judgment" (R. p. 8).

There being no *issue of fact* before the court, it was not within the province of the court to *find* facts, and certainly the court would have no power to find facts which were not before him. But appellants have no quarrel with the record on that score, and even though the statement made by the trial court be superfluous and unsupported by the agreed facts, we deem the circumstance of no consequence, because we do not believe that this court should be called upon to deal with presumptions of fact at this time, nor to presume or undertake to speculate on the number of creditors *who may accept* and the probable aggregate sum of *their* claims, in order to determine whether or not the statutory discharge will become effective. It is sufficient that ap-

pellants should not be required to accept under the assignment with this *uncertainty*, and that they not be required to presume or speculate upon these later developed facts. If $1,500.00 of claims were filed by assenting creditors, more than the statutory one-third would be paid, and the discharge become fully effective, and for aught that appears in this record, this question is as open now and subject to just as much speculation as it was at the trial in the court below, and when appellant was called upon to either accept under the assignment or challenge it.

These statements of facts set out in appellee's brief, would seem to create the impression that the assignment was not statutory and it was merely a case of turning over the assets to be distributed among the creditors, share and share alike, calling for no acceptance on the part of the creditors, and seeking no discharge and that this distribution would be made to all creditors, irrespective of that provision of Article 265, requiring that no creditor not assenting shall receive or take any benefit under the assignment.

Such an interpretation of the facts in this case is so in conflict with the record that appellant feels called upon to challenge these statements as misleading, and unsupported by the record.

Appellants rest their case upon the facts *shown by this record*, and in their brief they have attempted to set out these facts correctly, and impartially, and they regret the necessity of challenging appellee's statements.

Respectfully submitted,

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Spearman Webb